No. 175

In the Supreme Court of the United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, ET AL.,
APPELLANT

v.

INLAND WATERWAYS CORPORATION, ET AL.,
APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT

DECEMBER 1942.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES	3
STATEMENT	3
PROCEEDINGS BEFORE THE COMMISSION	4
RATE BACKGROUND	6
THE REPORT OF THE COMMISSION	12
THE FINDINGS OF THE COURT BELOW	20
SUMMARY OF ARGUMENT	22
ARGUMENT	28
I. The issues presented to the Commission involved the performance of the administrative function of determining whether the exclusive application of the local rates to ex-barge grain traffic would result in violations of Sections 1, 2, or 3 of the Interstate Commerce Act	28
II. The Commission's finding that the local rates as applied to the ex-barge grain traffic would not be unreasonable or result in an unjust discrimination or undue prejudice was based upon adequate findings with respect to the measure of the local rates and the measure of the inbound and through rates, the length and nature of the inbound and through transportation service, and other relevant facts and circumstances	32
III. In resolving the issues of unjust discrimination and undue prejudice under sections 2 and 3 (1), the Commission properly considered the entire movement of the grain as a basis for a finding of differing circumstances and conditions	36

504007—43——1

ARGUMENT—Continued.

Page

IV. The Commission, in sustaining the lawfulness of the suspended tariffs properly gave consideration to the prescribed relation of the proportional and local rates to Official Territory and the rate structure as a whole and to the imminent breakdown of these rate relations in the continued application of the proportional rates to ex-barge grain 42

V. In sustaining the lawfulness of the suspended tariffs the Commission did not offend against the National Transportation Policy 47

VI. The Commission's conclusion that the proposed rates will not discriminate unjustly against the traffic of appellee barge lines in favor of the traffic of the lake lines, being based upon a finding supported by substantial evidence of the existence of differentiating circumstances and conditions, may not be disturbed 52

VII. The Commission fully performed its duties in this proceeding 54

A. The Commission properly took into consideration the changes made in the Interstate Commerce Act by the Transportation Act of 1940 54

B. The Commission was not required to exercise its powers under section 6 (11) (b) in this proceeding 57

CONCLUSION 60

APPENDIX 62

TABLE OF CASES CITED

Page

Akron, C. & Y. Ry. Co. v. *United States*, 22 F. (2d) 199 ..... 27, 58
Allen & Wheeler Co. v. *Akron, C. & Y. Ry. Co.*, 225 I. C. C. 179 34
Atchison, T. & S. F. Ry. Co. v. *United States*, 279 U. S. 768 37
Atlantic C. L. R. Co. v. *Cape Fear Rys., Inc.*, 218 I. C. C. 152 53
Bituminous Coal to Youngstown, 163 I. C. C. 3 38
Board of Trade v. *United States*, 314 U. S. 534 ..... 23, 24, 25, 31, 43
Buffalo Grain Cases, 46 I. C. C. 570 38
Central Pennsylvania Coal Producers Ass'n. v. *B. & O. R. Co.*, 196 I. C. C. 203 ..... 25, 38
Co-operative Elevator Co. v. *Wabash Ry. Co.*, 192 I. C. C. 583 34
Ex-Lake Ore from Chicago to Granite City, 120 I. C. C. 75; 123 I. C. C. 503 38
Ex-River Grain From St. Louis to the South, 203 I. C. C. 385 ..... 15, 25, 41
Freight Rates from Minnesota Points, 32 I. C. C. 361 60
Goldcamp Mill Co., Inc. v. *Akron, C. & Y. Ry. Co.* 195 I. C. C. 329 34
Grain and Grain Products, 144 I. C. C. 497 34
Grain and Products to Chesapeake & O. Branch Lines, 196 I. C. C. 751 34
Grain Rates in Central Freight Ass'n Territory, 28 I. C. C. 232 46
Great Northern Ry. Co. v. *Sullivan*, 294 U. S. 458 37
Hocking Valley Ry. Co. v. *Lackawanna*, 224 F. 930 ..... 24, 36
Illinois Central R. R. Co. v. *Interstate Commerce Commission*, 206 U. S. 441 ..... 23, 28
Indianapolis B. of T. v. *Balt. & O. R. Co.*, 129 I. C. C. 675 ..... 34, 40
Interstate Commerce Commission et al. v. *Oregon-Washington R. & N. Co. et al.*, 288 U. S. 14 4
Interstate Commerce Commission v. *Balt. & O. R. Co.*, 145 U. S. 263 40
Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.*, 37 F. 567 53
Livestock to Eastern Destinations, 156 I. C. C. 498 58
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 ..... 23, 28
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 ..... 26, 48
Nashville Ry. v. *Tennessee*, 262 U. S. 318 ..... 23, 29
Naval Stores from Mississippi to Gulf Ports, 235 I. C. C. 723 49
Northern Pacific Ry .Co. v. *United States*, 316 U. S. 346 ..... 24, 31, 44
Pennsylvania Co. v. *United States*, 236 U. S. 351 ..... 27, 53
Quanah, A. & P. Ry. Co. v. *Atchison, T. & S. F. Ry Co.*, 211 I. C. C. 389 53
Rates on Bunker Coal, 73 I. C. C. 62 ..... 25, 38
Salt from Louisiana Mines to Chicago, 69 I. C. C. 312 58
Sand, Gravel, and Crushed Stone to Southern Illinois, 160 I. C. C. 507 37

Page

Scandrett v. *United States*, 32 F. Sup. 995 ..... 26, 52
Seatrain Lines, Inc. v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7; 243 I. C. C. 199 ..... 51, 53
Southwestern Millers' League v. *Atchison, T. & S. F. Ry. Co.*, 231 I. C. C. 130, 227 I. C. C. 795 10
St. L. S. W. Ry. Co. v. *United States*, 245 U. S. 136 24
Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197 ..... 25, 37
United States v. *Louisville & N. R. R. Co.*, 235 U. S. 314 23
United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490 ..... 23, 34
United States v. *Trucking Co.*, 310 U. S. 344 ..... 23, 30
Valley Grain Co., Inc. v. *Cleveland C. C. & St. L. Ry. Co.*, 159 I. C. C. 223, 167 I. C. C. 190 34
Virginian Ry. Co. v. *United States*, 272 U. S. 658 28
Youngstown Co. v. *United States*, 295 U. S. 476 ..... 23, 25, 34, 38, 46

STATUTES CITED

National Transportation Policy (49 U. S. C. 1) 49, 62
Interstate Commerce Act (49 U. S. C. 1 et. seq.) 62
Sec. 1 5 (a) 62
Sec. 2 63
Sec. 3 (1) 26, 50, 63
Sec. 3 (4) 26, 27, 50, 52, 55, 64
Sec. 6 (11) (a) 64
Sec. 6 (11) (b) 25, 27, 40, 49, 56, 58, 65
Sec. 15 (7) 27, 57, 58, 65
Sec. 15 (a) (2) 26, 51, 67
Sec. 305 (c) 26, 40, 57, 68
Sec. 307 (d) 40, 69
Transportation Act of 1920 (49 U. S. C. 142) 48
Sec. 500 48
Inland Waterways Corporation Act 49
Sec. 3 (c) (49 U. S. C. 153) 49

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 175

INTERSTATE COMMERCE COMMISSION ET AL.,
APPELLANT

v.

INLAND WATERWAYS CORPORATION ET AL.,
APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT

OPINIONS BELOW

The initial report and order of the Interstate Commerce Commission (R. 18–353)[1] is reported in 246 I. C. C. 353. The report of the Commission on reconsideration (R. 47) is reported in 248

[1] The full record in this case consists of the transcript of the proceedings before the specially constituted district court, together with exhibits which include the full transcript of the record before the Interstate Commerce Commission. By stipulation many of the exhibits produced before the Commission have been omitted in the printing.

I. C. C. 307. The findings of fact and conclusions of law of the District Court (no opinion was filed) are reported in 44 F. Supp. 368 (R. 1663).

JURISDICTION

The decree of the District Court was entered April 16, 1942 (R. 1677). The petition for appeal was filed and allowed on May 21, 1942. Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219–221 (U. S. C., Title 28, Secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted on October 12, 1942.

QUESTIONS PRESENTED

The ultimate question presented in this case is the validity of an order of the Interstate Commerce Commission vacating an order, made under the authority of section 15 (7)[2] of the Interstate Commerce Act, suspending certain tariffs of appellant rail carriers which deny the use of existing out-bound proportional rates on grain arriving at designated rate-break points by barge via Illinois Waterways when shipped by rail from such rate-break points to destinations in central and eastern territory. Subordinate questions presented are:

---

[2] See Appendix, *infra*, p. 65.

1. Whether the district court transcended its powers by substituting its judgment for that of the Commission upon a purely administrative matter.

2. Whether as a matter of law the tariffs in question were invalid under sections 2 and 3 of the Interstate Commerce Act.

3. Whether the Commission acted upon substantial evidence in finding that the tariffs in question were justified and not otherwise unlawful.

4. Whether the Commission fully performed its duties in the proceedings before it.

STATUTES

The pertinent portions of the Interstate Commerce Act are reproduced in the Appendix hereto.

STATEMENT

Two complaints were filed in the district court, one by Inland Waterways Corporation (R. 1) and the other by Cargill Incorporated and four other grain elevator companies (R. 133). These complaints sought to enjoin and set aside the operation and effect of an order of the Interstate Commerce Commission issued December 1, 1941, in *Grain Proportionals Ex-Barge to Official Territory*, I. & S. Docket No. 4718. Supporting this order the Commission had issued two reports, 246 I. C. C. 353 and 248 I. C. C. 307 (R. 18–353, 47). The United States, the Interstate Commerce Commission and six of the railroad companies whose

proposed tariffs were involved were named defendants in each of the complaints.

Final hearing before the court below, specially constituted of three judges, was held at Chicago, Ill., February 6, 1942. The two causes were consolidated for hearing and disposition. On the same day the Secretary of Agriculture and A. L. Mechling, doing business as A. L. Mechling Barge Line, were permitted to intervene as parties plaintiff and seven western trunk-line railroads were permitted to intervene as parties defendant (R. 206). At the same time also the Attorney General appeared in behalf of the United States and filed answers in which he declined to defend the order of the Commission on the ground that to do so would require him to assert a position on behalf of the United States which was being attacked by the head of a coordinate branch of the Executive Department of the Government (R. 197). The United States is not a party to this appeal.[3]

On April 16, 1942, the court below, without rendering an opinion, filed findings of fact and conclusions of law and entered its final decree (R. 1663, 1667). From this decree a direct appeal was taken to this Court.

PROCEEDINGS BEFORE THE COMMISSION

By tariffs filed to become effective October 15, 1939, the appellant eastern lines railroads pro-

[3] *Interstate Commerce, et al.* v. *Oregon-Washington R. and N. Co.*, 288 U. S. 14.

posed to restrict their proportional or reshipping rates on grain and grain products, in carloads, from Chicago, Ill., and other related rate-break points, to eastern destinations so that they would not apply on ex-barge traffic over the Illinois Waterways. Following protests, including those of appellees herein the Commission, pursuant to section 15 (7) of the Interstate Commerce Act,[4] suspended the operation of these tariffs and entered upon an investigation of their lawfulness (R. 15). This suspension order was dated October 14, 1939, and deferred the use of the tariffs until May 15, 1940, at which time the Commission's power to suspend became exhausted.[5] Subsequent to that date the respondent carriers voluntarily postponed the effectiveness of the tariffs pending decision of the Commission.

The proceedings before the Commission went through the usual course. Extensive hearings were had followed by the examiner's proposed report which was issued after the suspension power of the Commission had been exhausted. The case was briefed and argued orally before Division 2 of the Commission. On July 31, 1941, the Commission, Division 2, issued its report and order wherein it found that the tariff schedules were not unlawful. The suspension order was vacated

[4] See Appendix, *infra*, p. 65.

[5] Sec. 15 (7). The suspension period is seven months: see Appendix, *infra*, p. 65.

504007—43——2

and the proceedings discontinued as of August 30, 1941. Thereafter petitions for rehearing and reconsideration were filed. On December 1, 1941, the entire Commission issued its report and order on reconsideration. Again in this report, while modifying in some particulars the prior report of Division 2, the Commission found the proposed tariffs to be just and reasonable and not otherwise unlawful. The suspension order was vacated and the proceeding discontinued as of December 22, 1941 (R. 77).

RATE BACKGROUND

From producing and gathering points in the west rail rates on grain and grain products apply to points known as gateways or rate-break points. Chicago is the principal rate-break point involved in this proceeding. From Chicago and other gateways to destinations in the East certain proportional rates are applied to make up the through transportation charges from origins beyond Chicago to ultimate destinations in Official Territory.[5] Local rates are also published.

On movements of grain from Chicago to destinations in Central Territory there are in effect

[5] Territory east of the Mississippi River and north of the Ohio and Potomac Rivers except the northern peninsula of Michigan. Official Territory is itself subdivided: (1) Central Territory is the area west of a line drawn through Pittsburgh and Buffalo; (2) Trunk-line Territory lies between Central Territory and New England Territory; (3) New England Territory is composed of the New England States.

four levels of rates: (1) Trans-Mississippi; (2) Northwest; (3) Illinois Reshipping; (4) Local. The Trans-Mississippi basis of proportional rates is applicable when the out-bound rail movement from Chicago is comprised of rail grain that has originated in Trans-Mississippi Territory.[7] The Northwest proportional basis is applicable when the out-bound shipment consists of grain which has originated in Northwest Territory.[8] The Illinois Reshipping proportional rates apply when the out-bound shipment consists of rail grain which has originated in Illinois. By specific tariff publication the Illinois Reshipping proportionals are not available on grain which reaches Chicago by water. The one exception to this territorial basis of proportional rates to Central Territory is grain that arrives by barge via Illinois Waterways. Such ex-barge grain moves on the Northwest proportional rates although the greater volume of this traffic is corn from Illinois (R. 1654, Ex. 19).

The local rates to Central Territory points apply on local grain, grain localized by the expiration of the transit privilege, grain that comes

[7] Comprising generally the States of Arizona, Arkansas, Colorado, Kansas, Missouri, New Mexico, Nebraska, Oklahoma, Texas, Utah, and certain stations in Iowa and South Dakota (R. Exhibit 1).

[8] Comprising generally North Dakota, South Dakota, Minnesota, Wisconsin, upper peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, and Washington, and certain Canadian provinces (R. Exhibit 1).

in by truck and in-bound rail grain that has moved on truck-barge competitive intrastate rates.

On movements of grain from Chicago to destinations in Trunk Line and New England Territories there are two levels of rates: (1) Proportional; (2) Local. The proportional rate from Chicago is the same regardless of origin. However, from Peoria, a gateway involved in this case, to Trunk Line Territory, a differential exists as between Northwest grain and Trans-Mississippi grain designed to equalize the difference in the in-bound rate from Trans-Mississippi Territory to Peoria and Chicago, respectively, as compared with the identical in-bound rate from Northwest Territory to Chicago or Peoria (R. Ex. 7).

It is also to be noted that where the grain is for export there is a substantial differential in both the proportional and the local rates, respectively.

The local rates to Central and New England Territory points apply on local grain, grain localized by the expiration of the transit privilege, grain that comes in by truck and in-bound rail grain that has moved on the truck-barge competitive intrastate rates.

The varied applications of these rates from Chicago to representative destinations in Central and Trunk Line Territories have been tabulated in the first report of the Commission (R. 18–365).

There is a local level of rates applicable on movements of grain between points within Official Territory known as the Official Territory level. From the gateways the local rates are higher than the proportional rates. On rail grain that moves from Illinois points via Chicago to points in Central Territory the "Reshipping" proportionals apply which together with the in-bound rates reflect the Official Territory local level. From the same origins to Trunk Line Territory points joint through rates via Chicago and other gateways are in effect. On such movements the proportional rates from Chicago cannot be applied. These joint through rates likewise reflect the Official Territory local level of rates.

The rates from the various western origins to Chicago plus the applicable proportionals from Chicago to destination make up the through transportation charges. The history of these proportional rates shows a continuing design to maintain proper relationships of the over-all charges for the through transportation.

Proportional rates from Chicago to destinations in Central Territory had been previously prescribed by the Commission to equalize the in-bound rate to Chicago from Trans-Mississippi and Northwest Territories the latter in-bound proportional rate being 3 cents lower than the

former.[9] This rate relation was referred to by the Commission in its first report (R. 18–366) citing *Southwestern Millers' League* v. *Atchison, T. & S. F. Ry. Co.*, 231 I. C. C. 130, where it was stated:

> Kansas City is what is known as Trans-Mississippi River origin territory, and Minneapolis is in northwest territory. To most of the destination territory we required a parity of through rates from Minneapolis and Kansas City on traffic from beyond. This was accomplished by making the factors of the combination rates 3 cents higher, beyond Chicago and other related eastern gateways (no one factor through rates being in effect), on traffic from beyond Minneapolis, than on traffic from beyond Kansas City, because of inbound rates to Chicago 3 cents less from Minneapolis than from Kansas City.

Thus the application of Northwest proportional rates from Chicago to Central Territory destinations was designed to equalize the through transportation charges from origins in Trans-Mississippi Territory.

---

[9] "We there pointed out (225 I. C. C. 195) that there were no one-factor rates from and to the affected points, all through rates being combinations of proportionals to and from Chicago; that the factors to Chicago were those prescribed by us on further hearing in *Grain and Grain Products*, 205 I. C. C. 301, and were 3 cents lower from Minneapolis-Duluth than from the Missouri River. * * *." *Southwestern Millers' League* v. *Atchison, T. & S. F. Ry. Co.*, 227 I. C. C. 795, 796.

The Northwest proportionals were originally and have continued to be applicable on grain arriving at Chicago by lake. As first published ex-lake grain was limited to grain originating in Northwest Territory, this limitation reading:

> * * * on shipments which arrive by boat lines at Chicago, Ill., originating at any of the points in the defined territory."

In 1932, this limitation was amended to read:

> On shipments which arrived by boat line at Chicago, Ill., Kewaunee, Milwaukee or Manitowoc, Wis.

In 1933, the Illinois River having been opened to traffic, grain produced in Illinois began moving in volume to Chicago by barge from river points. Because of the change in wording making the Northwest proportional rates available to grain arriving at Chicago via "boat line," this grain became entitled to the use of the Northwest proportional rates on rail movement outbound from Chicago to Central Territory, notwithstanding that it had originated in Illinois and, had it moved to Chicago by rail, would have taken the Reshipping rate which was designed to afford the proper outbound basis of charge for grain originating in Illinois. Thus this grain was and is being reshipped from Chicago to Central Territory destinations on proportional rates which had originally been intended to apply only to grain from Northwest Territory.

The tariffs providing for the use of the proportional rates to destinations in Trunk Line Territory provided that the rates were applicable on traffic reaching the gateway via "rail or water transportation line" (R. Ex. 1, p. 19). Thus these proportional rates became available on ex-barge grain arriving at Chicago via Illinois Waterways.

In summary, at the time that the tariffs in question were filed and at present the single level of proportional rates from Chicago apply uniformly on ex-rail, ex-lake, ex-barge to Trunk Line and New England Territories. To Central Territory three levels of proportional rates apply: (1) Trans-Mississippi; (2) Northwest; (3) Reshipping (Illinois). Only the Northwest rate applies on ex-lake and ex-barge grain. The local rate applies on local, ex-truck, or wagon grain, and ex-rail grain which arrives at Chicago from Illinois points under intrastate rates which had been published to meet barge competition.

The tariffs in issue proposed to restrict the application of the proportional rates so that they would not apply to ex-barge grain, thus leaving in effect the local rates to apply on such grain from Chicago and related gateways.

THE REPORT OF THE COMMISSION

The issues before the Commission were the lawfulness, under Sections 1, 2, and 3 of the Act, of the tariffs which thus limited the application of the proportional rates.

The report of the Commission, Division 2, issued on July 31, 1941. After reciting the history of the proceedings and the effect of the suspended tariff (R. 18–353), the report proceed to a discussion of the evidence. This included the history of the Illinois waterways (R. 18–354), the location of the principal points from which grain is barged to Chicago (R. 18–355), the volume of grain moving in and out of Chicago (R. 18–355), the corn producing section of Illinois and part of Indiana (R. 18–355), the railroads serving this territory (R. 18–356), the published rail rates into Chicago from the principal producing points in that territory (R. 18–356), the volume of barge movement into Chicago and the charges for barge transportation (R. 18–356), the Chicago Board of Trade practices (R. 18–359), the effect of barge versus rail delivery costs at Chicago (R. 18–361) and proportional and local rates from Chicago to representative eastern destinations (R. 18–365). Discussing the issue of the reasonableness of the local rates on this traffic, the report points out that "if the suspended schedules are found justified, resulting in the application of the local rates, the increases in the rates to Central Territory points would range from 1.5 to 7.5 cents, and to the eastern points named the increase would be uniformly 8.5 cents" (R. 18–366). The report rejected the validity of the contention that the local rates compare unfavorably with the average revenue secured

by the rail carriers from all freight handled for its average distance and pointed out that "these local rates range from 17.3 to 25.7 percent of first class and are substantially under the level of the sixth-class rates (27.5 percent of first class) which we have found, in the reports cited in the footnote, to be a maximum reasonable basis, or not unreasonable or otherwise unlawful on grain and grain products within official territory" (R. 18–366).

The report shows the effect of continuing the existing proportional rates on ex-barge grain. While the proportional rate tariffs provide "that in no case shall the combination through rates to and from the reshipping point be less than the local rate from the reshipping point to final destination," the report finds that this provision was not effective on the existing barge-rail combinations, thus (R. 18–374):

> For example, such combinations [barge-rail proportionals] result in lower through charges to the Atlantic seaboard than the local rates to the same destinations from intermediate origin points on: (1) Domestic grain from all points in Central Territory (Chicago and east) west of a line drawn from Bay City, Mich., through Jackson and Sturgis, Mich., and Kendallville, Fort Wayne, Marion, Westville, Indianapolis, Greensburg, Ind., to Aurora, Ind.; (2) export grain from all points in Central Territory (Chicago and east) west of a line drawn from Atkins, Mich., through

> Oxford, Ann Arbor, Hanover, and Pittsford Junction, Mich., and thence along the Ohio-Indiana State line to the Ohio River; and (3) export traffic of barley, corn, oats, rye, and wheat from all points in Central Territory (Chicago and east) west of a line drawn from Painesville through Lordstown to East Liverpool, Ohio.

The report then goes on to find that (R. 18–375):

> The proposed schedules not only contemplate clarification of the schedules, but also have the effect of maintaining the existing grain-rate structure, which has already been partially disrupted in the State of Illinois. See *Corn Grits from Kankakee, Ill., to Battle Creek, Mich.*, 237 I. C. C. 413. If the ex-barge grain is permitted to continue to obtain the benefit of the proportional rates east of the rate-break points, that application will, because of fourth-section evasions, also disrupt the grain rate structure as far east as Painesville and East Liverpool, Ohio, the latter being approximately 300 miles from Baltimore.

On the question of discrimination, preference and prejudice the report found on the authority of *Ex-River Grain From St. Louis to the South*, 203 I. C. C. 385, that the service in the transportation of the ex-rail and ex-water traffic is not under substantially similar circumstances and conditions (R. 18–376).

The ultimate finding of the Division was (R. 18–381):

> We conclude that the proportional rates here in issue have never been applicable on this barge traffic moving on unfiled rates, and find that the schedules under suspension are not shown to be unlawful.

The report of the Commission on reconsideration again found the suspended schedules not unlawful.[10] Since the date of the hearing in the case the barge lines by the Transportation Act of 1940 were made subject to the Commission's jurisdiction. The Commission report took notice of the fact that the barge lines had filed with the Commission their port-to-port grain rates (R. 49).

The Commission summarized the facts and found them to be as detailed in the first report (R. 55).

The report compared the in-bound barge rates to Chicago with the in-bound rail rates. It found them to range from 2.75 to 4.5 cents for hauls ranging from 57.5 to 200.9 miles as contrasted

---

[10] So far as the issues in this case are concerned, the findings of Division 2 and the findings of the Commission on reconsideration are identical. The modification and clarification spoken of in the last report (R. 55) refers only to the lawfulness of the application of proportional rates to ex-barge grain under existing tariffs. In contrast to the finding of Division 2, the report on reconsideration holds that the proportional rate may be applied on this traffic notwithstanding that the other factor of the through rate is not on file with the Commission so long as the policing provisions are strictly complied with and adequate proof is furnished with respect to the identity of the in-bound water carriers, the origin of the traffic, and the rate paid thereon (R. 51).

with the in-bound rail rates ranging from 9.5 to 13 cents (R. 52).

Particularly the Commission found (R. 52):

> * * * The proposed schedules will result in increases in the barge-rail combinations ranging from 1.5 to 7.5 cents to central territory and in a uniform increase of 8.5 cents to trunk-line territory. The proposed ex-barge rates, which are the same as the local rates, range from 17.3 to 25.7 percent of first class and are substantially below the level of the sixth-class rates (27.5 percent of first class) which has been prescribed or approved as a reasonable maximum basis in official territory.
>
> To central territory, the barge-rail combinations, even under the proposed schedules, will still be generally lower than the all-rail rates. From Morris, Ill., a representative origin, via Chicago, to Indianapolis, Ind., Detroit, Mich., and Cleveville, Ohio, the barge-rail combinations will be 1.75, 4.75, and 0.75 cents, respectively, lower than the all-rail rates.
>
> To trunk-line territory, the in-bound barge movement represents a very small proportion of the total haul. The distance from Morris to Chicago by river, 57.5 miles, plus 880 miles rail short line to New York is 937.5 miles. The water portion of the haul is but 0.6 percent. To this territory, the barge-rail combinations are far below the local rates from the reshipping points in contravention of the fourth-section rule,

while the all-rail rates are in strict conformity with that rule. The present barge-rail combination from Morris via Chicago to New York is 28.75 cents (composed of the in-bound barge rate of 2.75 cents plus the out-bound proportional rail rate of 26 cents), or 5.75 cents lower than the 34.5-cent local rate from Chicago, while the all-rail rate from Morris is 35.5 cents (composed of the in-bound interstate rail rate of 9.5 cents plus the out-bound rate of 26 cents), or 1 cent higher than the local rate from Chicago. Under the proposed schedules, the barge-rail combination from Morris to New York will be 37.25 cents (2.75 cents in-bound plus 34.5 cents out-bound), or 2.75 cents higher than the local rate from Chicago and only 1.75 cents higher than the all-rail rate.

To central territory, the ex-rail proportional rates are made 3 cents higher from the Northwest than from trans-Mississippi territory so as to equalize the Twin Cities with Kansas City in connection with the in-bound rail rates. The in-bound haul in connection with the ex-lake traffic is from the head of the lakes or beyond and is much longer than in connection with the ex-barge traffic. The rail-lake-rail rates from the Northwest are therefore much higher than the local rates from Chicago or the barge-rail combinations and do not contravene fourth-section principles or jeopardize the all-rail rate structure.

On the issue under Sections 2 and 3 the Commission found (R. 54):

> Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and the Federal Barge Lines as a connecting line, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic and in favor of shippers, elevator operators, and dealers interested in ex-rail and ex-lake traffic and respondents' connections by rail and lake. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forefeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to

> the relative length and nature of the inbound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-and-rail rates lower than the combinations.

The ultimate finding of the Commission was (R. 55):

> On reconsideration of the record in the light of petitions and replies thereto and our prior decisions, we find that:
>
> (1) The proportional rates here under consideration were legally applicable on the ex-barge traffic where the so-called policing provisions were strictly complied with.
>
> (2) The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful.

THE FINDINGS OF THE COURT BELOW

The conclusion of the court below upon the merits was (R. 1676):

> The order of the Interstate Commerce Commission discriminates against water competition by the users of barges.

In support of its conclusions of law the court below made independent findings of fact, based upon the evidence before the Commission, among which were the following (R. 1674):

> The breakdown of the rail rate structure referred to by the Commission related to

the publication by western lines of intrastate rail rates to Chicago below the normal basis of intrastate rates, and such publication was made in an effort to compete for the inbound haul of grain to Chicago.

* * * * *

If the proposed rates become effective, there will be less incentive than at present for a shipper to use barge service rather than rail service to Chicago from origins on the Illinois waterways and other rivers connecting therewith, and there will be less incentive for purchasers of grain at Chicago to purchase ex-barge grain.

If the order of the Commission of December 1, 1941, becomes effective and the defendant carriers make the changes in rates and charges authorized thereby, the interests of grain producers now enjoying barge transportation into Chicago will be adversely affected.

The natural transporation advantages enjoyed by producers of grain located near the Illinois River waterways does not enable them to undersell other grain producers in the Chicago market. The grain of producers enjoying cheap water transportion is sold delivered at Chicago. The measure of the in-bound rate has no effect upon the Chicago price; it only affects the net price to producers. Producers who cannot use water transportation are under no disadvantage whatsoever because of the transporta-

tion advantage of other farmers located upon the waterways.

If the order, referred to above, becomes effective, there will be effected, to the extent of the territory involved, a nullification of a consistent national policy to further the improvement of inland waterways in order to provide economical transportation.

The action of the Interstate Commerce Commission in the order, referred to above, is, in practical effect, an attempt to bring about a cartelization of barge and rail transportation, which, if consummated, would destroy competition between these two means of transportation.

* * * * *

The Interstate Commerce Commission took no evidence addressed to the issue whether the rate proposal in question is in violation of Section 3 (4) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, or contrary to the National Transportation Policy enacted by the last said act; but the Interstate Commerce Commission passed upon the legality of said rate proposal upon evidence taken without reference to such issues and before they existed.

SUMMARY OF ARGUMENT

It is well established that findings of reasonableness under section 1, of unjust discrimination under section 2, and of undue preference or prejudice under section 3, of the Interstate Commerce

Act, are administrative questions of fact for determination by the Commission. *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Nashville Ry. Co.* v. *Tennessee*, 262 U. S. 318, 322; *Board of Trade* v. *United States*, 314 U. S. 534.

A court may not substitute its judgment for that of the Commission in respect of these matters. *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314; *United States* v. *Trucking Co.*, 310 U. S. 344, 352.

In the instant case the Commission found that the application of the local rates to ex-barge traffic would not result in violations of sections 1, 2, or 3 of the Act.

The considerations which lead the Commission to the conclusion that the rates were not unreasonable were set out in its two reports in this case. These included rate comparisons based upon total transportation charges from points of origin to final destination; comparison of barge rates versus rail rates in-bound to Chicago; barge-rail combinations versus all-rail combinations to Official Territory destinations; and the local rates in the light of prescribed maximum reasonable rates prescribed by the Commission on grain and grain products. These were proper considerations *Youngstown Co.* v. *United States*, 295 U. S. 476, 480; *United States* v. *Northern Pacific Ry. Co.*,

288 U. S. 490, 500. The Commission likewise took into consideration the effect of continuing the existing proportional rates on ex-barge traffic and found that fourth section violations resulted and that the rail grain rate structure was being broken down. Compare *Board of Trade* v. *United States, supra; Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346.

On the issue of unjust discrimination and undue prejudice the Commission found that the circumstances and conditions surrounding the inbound and combination movement of the ex-barge traffic so differed from the combination ex-rail and ex-lake traffic as not to constitute violation of sections 2 or 3.

The Commission properly compared the entire movements from origin through Chicago to final destination. The contention that the Commission must confine its consideration to the movements east of Chicago is not valid. To sustain this contention would be to destroy the entire conception of proportional rates.

Proportional rates have long been recognized. They are components of a through rate. *Hocking Valley Ry. Co.* v. *Lackawanna,* 224 F. 930; *St. L. S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 139. The justification for maintaining a proportional rate lower than the local rate rests upon the through movement as presenting differing circumstances and conditions. The same dis-

tinction justifies rates in the nature of proportional. The validity of the latter has long been recognized. *Texas & P. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197; *Rates on Bunker Coal,* 73 I. C. C. 62; *Central Pennsylvania Coal Producers Ass'n* v. *B. & O. R. Co.,* 196 I. C. C. 203. The validity of such rates has been recognized in the Interstate Commerce Act itself. Section 6 (11) (b).

Where differentiating circumstances are found in the length and nature of the in-bound and through service and the measure of the in-bound and through rates the Commission may lawfully find that no violations of sects. 2 and 3 are present.—*Ex-River Grain from St. Louis to the South,* 203 I. C. C. 385, 390.

The Commission properly gave consideration to the prescribed relation of the proportional rates to Official Territory, the rate structure as a whole and the imminent break-down of these rate relations in the continued application of the proportional rates on ex-barge grain.

The matter of the maintenance of the grain rate structure and the effect of the use of the proportional rates on the structure was a valid consideration. *Board of Trade* v. *United States, supra; Northern Pacific Ry. Co.* v. *United States, supra; Youngstown Co.* v. *United States, supra.* The record showed and the Commission found that the rail grain rate structure had already commenced to break-down and further disruption

was threatened. The court below erroneously found that the break-down of the rate structure referred to by the Commission related to the publication by the western lines of intrastate rates below the normal basis of the interstate rate.

Prior to the Transportation Act of 1940, the preservation of competition between carriers was considered to be in the public interest. *Mississippi Valley Barge Line* v. *United States*, 292 U. S. 282, 288. The powers given the Commission with respect to water transportation have always shown that differences in rates and practices as between rail and water carriers were contemplated. The Transportation Act of 1940 did not change this policy. This is demonstrated by the amendments to sections 3 (1) and 15 (a) (2) and the enactment of section 305 (e). So in according ex-barge traffic treatment different from that accorded ex-rail traffic the Commission did not offend against the National Transportation Policy but was merely exercising the administrative judgment which Congress has reposed in it. Compare *Scandrett* v. *United States*, 32 F. Supp. 995, affirmed 312 U. S. 661.

The conclusion of the Commission that the proposed rates would not discriminate unjustly against the traffic of the appellee barge lines in favor of the traffic of the lake lines in violation of section 3 (4) was properly based upon a finding of differentiating circumstances and conditions.

Pennsylvania Co. v. *United States*, 236 U. S. 351, 361. In so doing the Commission properly considered the differences between the lake and barge traffic.

The Commission considered the effect of the amendment to section 3 (4) on the basis of the record then before it and the fact that appellee barge lines had come within its jurisdiction under part III. The petitions of the barge lines for reconsideration raised legal questions only and no rehearing was sought to show other new or material facts which might influence the Commission to arrive at a different conclusion on the issue of the lawfulness of the application of the local rates to the ex-barge traffic. Nor did the appellee barge lines seek to supplement the record with evidence to enable the Commission to exercise its jurisdiction to prescribe proportional rates applicable to the barge traffic.

The Commission in exercising its powers under section 15 (7) is not required to consider and fix some other or different rates from the suspended ones (*Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. 2d 199), although it may do so. Its refusal in this case to act under section 6 (11) (b) was not arbitrary since it found that the record was insufficient to warrant prescribing proportional rates on the traffic in question. Moreover, it stated that in a proper proceeding it might prescribe proportional rates on the ex-

barge traffic lower than the combination barge and local rail rates.

ARGUMENT

I

The issues presented to the Commission involved the performance of the administrative function of determining whether the exclusive application of the local rates to ex-barge grain traffic would result in violations of sections 1, 2, or 3 of the Interstate Commerce Act

It has been established by a long line of decisions that the courts will not review and weigh the evidence to determine whether rates are unreasonable, unjustly discriminatory or unduly prejudicial.

The finding of unreasonableness like that of undue prejudice, is a determination of fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665, 666.

In *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, this Court said:

> It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 * * * renders unlawful any *"undue or unreasonable"* preference or advantage, prejudice or disadvantage, * * * and in the first paragraph of amended Section 15 * * * it is rates, regulations, or

practices that in the opinion of the Commission are "*unjustly* discriminatory, or *unduly* preferential or prejudicial," etc., to which the prohibition is to be applied.

Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative order operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

This principle was reemphasized in *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 322:

Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by sections 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219, 220; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily

left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case.

Again in *United States* v. *Trucking Co.*, 310 U. S. 344, 352, 353, this Court said:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." (Quoting from *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320) * * * the Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts,

of the existence of forbidden preferences, advantages, and discrimination.

A case bearing many points of analogy to the instant case is *Board of Trade* v. *United States,* 314 U. S. 534. There the Commission after an investigation of the grain rate structure in the western district prescribed rate-break combinations as the exclusive basis of transit privileges at primary markets while at the same time transit privileges at interior points on routes passing through a primary market were allowed on the basis of lower rates in effect over competing routes between the same points. This court held that "whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of these questions of fact that have been confided by Congress to the judgment and discretion of the Commission" and that considering the whole history of grain rate regulation the differentiation between primary markets and interior points thus made by the Commission was not an undue or unreasonable discrimination forbidden by the Act. Compare *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346.

Under the issues presented to it in this case the Commission was called upon to perform the purely administrative office of determining independently whether the rates in question were unreasonable or unjustly discriminatory or unduly prejudicial. In arriving at its decision that these

rates were not unlawful it took into consideration the many factors disclosed by a voluminous record. In two reports it set forth findings of fact which moved it to its decision. These factors as we shall endeavor later to show, were properly considered by it and afford a substantial and rational basis for the order which the court below has set aside.

II

The Commission's finding that the local rates as applied to the ex-barge grain traffic would not be unreasonable or result in an unjust discrimination or undue prejudice was based upon adequate findings with respect to the measure of the local rates and the measure of the in-bound and through rates, the length and nature of the in-bound and through transportation service, and other relevant facts and circumstances

The reasonableness of the local rates as such was not an issue before the Commission and is not contested here; the protests were to the subjection of the ex-barge traffic to the local rates. By the terms of the existing tariffs Illinois corn [11] which had arrived by rail at Chicago under intrastate tariffs, corn which had been trucked into Chicago, and corn which had forfeited the transit privilege, were not entitled to the use of the proportional rates outbound. To these classes of grain traffic the local rates were applicable.

[11] Corn was by far the bulk of ex-barge grain traffic (R. 1654, Ex. 19).

Corn moves into Chicago by truck in considerable volume.[12]

As has been shown in detail in the Statement (ante p. 12) the Commission in considering the reasonableness of the local rates as applied to ex-barge grain made many rate comparisons based upon the total transportation charges from points of origin to final destination. Barge rates versus rail rates into Chicago were compared. Barge-rail combinations versus all-rail combinations were shown both to Central and Trunk Line Territories. Representative examples were given. It was shown that the barge-rail combinations under the proposed tariffs would be generally lower than the all-rail rates. And from Morris, Ill., to destinations in Trunk Line Territory the barge-rail charges would amount to only 1.75 cents over the all-rail charges.

Furthermore, it was found that the proposed barge rates would not exceed the reasonable maximum basis which the Commission had already prescribed or approved as a maximum reasonable basis in Official Territory (Central, Trunk Line, and New England).[13]

---

[12] In 1939, 5,005,000 bushels of corn were received by truck at Chicago as compared with 13,206,000 bushels arriving via Illinois Waterways (R. 18–383). The reasonableness of the local rates on ex-truck corn was unquestioned.

[13] In the Division's report the following cases were cited as instances where the Commission had approved or prescribed the maximum reasonable basis on grain and grain

In *Youngstown Co.* v. *United States*, 295 U. S. 476, 480, it was held that rate comparisons "while not a conclusive test of reasonableness of a rate under investigation, have probative value," citing *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 500.

The Commission in examining the issues also took into consideration the effect of continuing the existing proportional rates on ex-barge traffic. It found that the Northwest proportional rates to Central Territory had never been designed to apply on grain originating in Illinois (R. 218, 273); that as a result of the use of these proportionals on ex-barge grain fourth-section violations existed and further that the grain rail rate structure was being broken down (R. 53).

The effect of the proposed tariffs upon producers and shippers of grain was considered. The Commission found that from May 1 to November 30, 1939, 7,305 carloads of corn were moved into Chicago by barge from the Illinois Waterways of which 1,160 carloads or 16 percent moved out on the proportional rates to Central and Trunk

products within Official Territory: *Indianapolis B. of T.* v. *Balt. & O. R. Co.*, 129 I. C. C. 675; *Grain and Grain Products*, 144 I. C. C. 497; *Valley Grain Co., Inc.* v. *Cleveland, C. C. & St. L. Ry. Co.*, 159 I. C. C. 223, 167 I. C. C. 190; *Co-operative Elevator Co.* v. *Wabash Ry. Co.*, 192 I. C. C. 583; *Goldcamp Mill Co., Inc.* v. *Akron, C. & Y. Ry. Co.*, 195 I. C. C. 329; *Grain and Products to Chesapeake & O. Branch Lines*, 196 I. C. C. 751; *Allen & Wheeler Co.* v. *Akron, C. & Y. Ry. Co.*, 225 I. C. C. 179.

Line destinations, 5,183 carloads or 71 percent moved out via lake and 235 carloads were disposed of locally leaving a balance of 725 carloads on hand (R. 18–366). It found that "the proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory," that the "operators will still have the benefit of the out-bound proportional rates where their in-bound haul is by rail or lake and also the benefit of the out-bound lake or lake-and-rail rates, irrespective of their in-bound haul, and this is likewise true of the Illinois shippers where their in-bound haul is by rail or barge, respectively" (R. 53).[14]

The Commission found the circumstances and conditions surrounding the in-bound and combination movement of the ex-barge traffic to differ sufficiently from those surrounding the in-bound and through movement of the ex-rail and

[14] In Appendix I of the first report it is shown that for the year 1939 corn receipts at Chicago by barge via Illinois Waterways were 13,206,000 bushels. Receipts by rail were 65,774,000 bushels. No ex-lake corn was received. In storage on the first of the year were 14,541,000 bushels. Corn moving out of Chicago by rail for the same year amounted to 21,664,000 bushels which under transit would exhaust the equivalent amount of in-bound rail billing leaving available for out-bound rail movement under proportional rates on corn arriving by other transport means 44,233,000 bushels worth of billing. Of the in-bound corn 32,535,000 moved out by lake and 30,710,000 bushels were consumed locally (R. 18–383, 384). Under these circumstances it is difficult to see as a practical matter wherein all in-bound corn which under transit loses its identity could not have been shipped by rail out of Chicago on the proportional rates.

ex-lake traffic as not to constitute a violation of Sections 2 and 3 of the Act.

III

In resolving the issues of unjust discrimination and undue prejudice under sections 2 and 3 (1), the Commission properly considered the entire movement of the grain as a basis for a finding of differing cirmumstances and conditions

Appellees have urged that in determining the existence of unjust discrimination under Sections 2 and 3 the Commission may not rely upon a dissimilarity of conditions prior to the rendering of the transportation service for which the charge in issue is assessed: that as a matter of law since the physical rail operation out of Chicago in moving ex-barge corn to eastern destinations is identical to the physical operation of moving any other corn from Chicago there cannot be two levels of rates. Of course there is no validity to this argument. There is no difference in the transportation of any corn considering only the movement from Chicago. To sustain this contention would be to destroy the entire conception of proportional rates based upon the theory of continuity of movement.

Proportional rates have had long-established recognition. They are components of a through rate. *Hocking Valley Ry. Co.* v. *Lackawanna,* 224 F. 930. Each proportional rate necessarily is a part of the through rate and is capable of

use only as such. *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 771. The justification for maintaining a proportional rate lower than the local rate on the same traffic between the same points, rests, therefore, upon the consideration of the through movement as presenting differing circumstances and conditions. The distinction has been made between true proportionals and rates in the nature of proportionals. But the same characteristics attend both, and both obtain legal sanction by virtue of differentiating factors reflected by the over-all movement of the commodity affected. Thus a lower basis of charge has been found justified where the movement into or out of the proportional rate point has been by means other than rail carriage. *Sand, Gravel, and Crushed Stone to Southern Illinois*, 160 I. C. C. 507, 524.

The legality of import and export rates was early enunciated in *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. It was there held that a less charge on import traffic from ports to inland destinations than on like domestic traffic from and to the same points was lawful because the circumstances and conditions surrounding the two forms of traffic were dissimilar. In the instant case we have proportional rates lower on export grain than the domestic proportional rates. On the same grounds the

Commission has prescribed or approved ex-lake rates on grain and iron ore, lake cargo, and ex-river rates on coal all of which are lower than the corresponding local rates. The ex-lake rates apply from Lake Erie ports on grain and iron ore which has been brought to the ports by boat,[15] lake cargo rates apply to Lake Erie ports on coal which is to be carried from the ports by boat, and the ex-river rates apply from Ohio River ports on coal which has been brought to the ports by barge.[16]

In *Rates on Bunker Coal*, 73 I. C. C. 62, the Commission found that rates lower than corresponding local rates on coal for delivery at ports into vessels for fuel use by such vessels were not unlawful because they were attended by differing circumstances and conditions.

In *Central Pennsylvania Coal Producers Ass'n. v. B. & O. R. Co.*, 196 I. C. C. 203, the Commission found that there was no violation of Section 2 where railroads maintained "transshipment" rates in the nature of proportional rates which were lower than the corresponding local rates and where one set of transshipment rates was lower than the other. There the Commission said, p. 235:

---

[15] *Buffalo Grain Cases*, 46 I. C. C. 570, 580; *Ex-Lake Ore from Chicago to Granite City*, 120 I. C. C. 75, 123 I. C. C. 503.

[16] *Bituminous Coal to Youngstown*, 163 I. C. C. 3. Compare *Youngstown Co. v. United States*, supra.

> Except as to traffic to nonadjacent foreign countries, the operators allege that the maintenance to the ports of Philadelphia and Baltimore of transshipment rates which are different for inside-the-capes than for outside-the-capes traffic, contravenes the provisions of Section 2 of the Act. As previously stated, the rail service rendered all transshipment coal is substantially the same. The coal which is charged the outside-the-capes rates, other than that which is exported, usually moves to New York Harbor or to New England, and that charged the higher inside-the-capes rates generally moves a relatively short distance by water to points within the respective harbors. Transshipment rates, like proportional rates, may vary between the same points so as to reflect, to some extent, the proportion of the through charges that the service rendered thereunder is of the entire transportation service performed.

The court below has also taken the position that, the services from the rate-break point being identical, it follows as a matter of law that there can be but one applicable rate: that the Commission in passing upon issues of discrimination and prejudice under Sections 2 and 3 cannot look behind the rate-break point to find differentiating circumstances and conditions. As has been shown this is in the teeth of the long-established characteristics of proportional or reshipping rates and if sound would, as the Commission stated, abolish all

proportional rates which may be lower than the local rates between the same points.

The Interstate Commerce Act recognizes that there may be two different rates between the same points. Section 6 (11) (b) defines proportional rates as "those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water." Section 305 (e) provides that "differences in * * * rates, fares, charges * * * of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, etc." And in 307 (d) the Commission is directed in case of a through rail-water route to prescribe "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

In concluding that the rates here in issue were not in violation of Sections 2 and 3, the Commission applied the principle that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge." *Interstate Commerce Commission* v. *Balt. & O. R. Co.*, 145 U. S. 263, 283. The Commission found differentiating circumstances and

conditions in the length and nature of the in-bound and through service and the measure of the in-bound and through rates.

A situation similar to the one here arose in *Ex-River Grain from St. Louis to the South,* 203 I. C. C. 385, 390. The Commission there stated:

> Protestants also stress the admission of respondents that there is no substantial difference between the transportation services performed on the ex-river and the ex-rail shipments and contend therefore that the respondents should not be concerned with the kind of carriers from which they receive their traffic. The contention disregards the basic principle of the all-rail rate adjustment. The proportional rates being equalizing factors of that adjustment are not designed for application to ex-river traffic. The corporation also contends that to charge ex-water shippers more than ex-rail shippers for the same service discriminates against the former, in violation of Section 2 of the Interstate Commerce Act. It does not appear that respondents' proposal would be unjust to any shipper. The service in the transportation of the ex-rail and ex-water traffic is not under substantially similar circumstances and conditions. The proportional rates are factors of through rates and such factors may differ with differences in origins or with differences in the character

of transportation to the point from which the proportional factors apply.

We submit, therefore, that the Commission properly looked at the transportation in question as a comparison of barge-rail and all-rail movements, and having found that there were sufficient distinguishing characteristics between the two, concluded that a rate for ex-barge traffic higher than for ex-rail was not in this case in violation of Sections 2 and 3. Even the dissenting expression of Commissioner Eastman does not challenge the administrative character of the Commission's action. His dissent went only to the soundness of the conclusion as administrative action (R. 55, 75).

IV

The Commission, in sustaining the lawfulness of the suspended tariffs properly gave consideration to the prescribed relation of the proportional and local rates to Official Territory and the rate structure as a whole and to the imminent break-down of these rate relations in the continued application of the proportional rates to ex-barge grain

The grain rate structure has been built up upon a system of rate-break combinations in lieu of one-factor through rates from country origins to various Central Territory destinations and sensitively related, separate proportional rates for outbound movement from these markets. And to Trunk Line and New England Territories one-factor through rates apply which reflect the combination made up of the rate to the gateway plus

the proportional rate beyond. The varying proportional rates to Official Territory had been fixed with reference to the origin of the shipments to provide gateway equalization.[17] Obviously any application of proportional rates to grain which had paid a substantially less than the rail rate into the gateway would, as shown, eventually force a breakdown of the through one-factor rates.

The inauguration of barge service from the Illinois corn-producing areas had introduced a new factor in the rate structure. Because of the broad language of tariffs, originally intended to apply only upon grain produced in and shipped from a described territory, the proportional rates from Chicago were made applicable to ex-barge corn which had been produced in a territory other than that described, while ex-rail corn produced in the same territory was, under another tariff, subject to a different scale of proportional rates.

Speaking of the grain rate structure, this Court has said in *Board of Trade* v. *United States, supra* (p. 548):

> That the Commission itself was of a divided mind in the successive stages of this controversy emphasizes that the problem (grain-rate structure) is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither

[17] See *supra*, p. 9.

> technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate break adjustment was designed to reverse—evils which, for all we know, would be far more serious than those complained of by the appellants.

The above case was cited with approval in *Northern Pac. Ry. Co.* v. *United States*, 316 U. S. 346, 349.

The problem before the Commission was what the effect would be of striking down the proposed tariffs. The Commission had before it evidence that there were presently effective all-rail proportional rates from various river points served by barge to destinations in Official Territory. (R. Ex. 5.) These rates had been prescribed by the Commission.[18] Permitting ex-barge grain to use the proportional rates resulted in the local domestic rate on grain from all points in Central Territory west of a line from Bay City, Mich., southwardly through Fort Wayne, and Indianapolis being higher than the combination barge-rail rate via Chicago from Illinois river points to Baltimore, Md., New York, N. Y., and Boston, Mass. Again, the local export rate on grain

[18] *Supra*, p. 33.

from all points in Central Territory west of a line running southwardly and south along the Indiana-Ohio line were higher than the barge-rail combinations from Illinois river points to the same eastern ports. And the local export rail rates on corn from all points in Central Territory west of a line between Paynesville and East Liverpool, Ohio, were higher than the barge-rail combination from the same river points to the same eastern ports. This is graphically illustrated by Exhibit 6. Thus there are many origin points in Indiana and Illinois from which all-rail service to the East is shorter than the all-rail service from Chicago yet for this shorter all-rail service the charge is higher than the sum of the barge rate to Chicago and the proportional rate to destination. (R. Ex. 61.) The effect of this disparity in rates was to attract to the waterways corn which would normally move all-rail to the east because the combination of the truck charge to the river station, barge rate to Chicago and the proportional rate east would be less than the all-rail rate (R. 258). Yet the transportation mileage would be substantially greater (R., Ex. 67). Clearly, as the Commission found, this disparity was leading to a disruption in the prescribed level of rates in Official Territory since it created a situation prejudicial to producers of corn in this area who could not avail themselves of barge transportation.

But the court below sidesteps these considerations by finding that the break-down of the rail rate structure referred to by the Commission related to the publication by the western lines of intrastate rail rates to Chicago below the normal basis of interstate rates (R. 1674). From the foregoing it is quite evident that the Commission was concerned with the grain rate structure within Official Territory and not only the barge competitive rate to Chicago. For thirty-five years rates on grain and related articles from country origins in Illinois to Trunk Line destinations have reflected the combination of proportional rates over Chicago. *Grain Rates in Central Freight Ass'n Territory*, 28 I. C. C. 232. The key rate or basis of the grain structure was the Chicago-New York rate. It was this rate structure that was being threatened and not only the Illinois rates.

In *Youngstown Co.* v. *United States*, *supra*, an order of the Commission prescribed minimum rates on ex-river coal from points on the Ohio River to destinations in northern Ohio. It found rates lower than the minima fixed would create discrimination against shippers in origin districts who could not use the water-rail route, and would tend to disrupt the rate structure and destroy proper differential between various producing districts. In sustaining the validity of this order, this Court held:

The appellant's principal complaint is that the Commission raised the permissible minimum rate to prevent disruption of the existing rate structure and relationship of rates for carriage from various producing regions to Ohio destinations, and that an order grounded upon any such consideration is unauthorized and violates the principle announced in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499. The position is not well taken. This record exhibits a situation quite distinct from that disclosed in the cited case. In the first place the Commission here found the required minimum reasonable; in the second place it had after full investigation in this and the Ohio case held the existing rate structure—built upon certain reasonable key or controlling rates by application of proper differentials—just and reasonable, and the ex-river rates here in issue, in contrast, too low.

V

In sustaining the lawfulness of the suspended tariffs the Commission did not offend against the national transportation policy

In administering the provisions of its organic law the Commission has always recognized the desirability of preserving competition not only between like transportation agencies but also between the different modes of transportation. As early as 1920 water transportation was recognized as having a definite place in the national trans-

portation system when Congress declared (Transportation Act, 1920, sec. 500; 41 Stat. 499, 49 U. S. C. 142):

> It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 288, this Court said with respect to this policy:

> The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as, e. g., in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all.

It thus appears that the mere fact that a water carrier's situation in the transportation field might have been worsened by the rates or practices of a competing railroad did not, *per se*, bring about a violation of the congressional policy. The soundness of this construction also found support

in authority given the Commission by the Inland Waterways Corporation Act, Sec. 3 (a), to differentiate between all-rail and water-rail transportation in prescribing all-rail rates and joint rail-water rates, and in the provisions of section 6 (13) (c), now 6 (11) (b), empowering the Commission to prescribe proportional rates by rail to and from the port and to determine upon what traffic and upon what terms and conditions such proportional rates should apply.

Again in administering the provisions of the Motor Carrier Act of 1935, and the congressional policy there declared, the Commission said in *Naval Stores from Mississippi to Gulf Ports*, 235 I. C. C. 723, 733:

> Healthy competition between different agencies of transportation is undoubtedly in the public interest. Ordinarily, either may initiate rates that will, in the opinion of its management, enable it to obtain or retain desired traffic provided that such rates are compensatory.

The National Transportation Policy enacted by the Transportation Act of 1940 declares the policy of Congress to be "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * * to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust

discrimination, undue preferences or advantages, or unfair or destructive competitive practices * * *" for the purpose of "developing, coordinating and preserving a national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States, etc."

Certainly there is nothing in the language of this policy alone that requires appellant railroads, to their own detriment, to accord barge traffic the same rates that they do to the traffic of other railroads. But appellees seem to argue that the inclusion of connecting common carriers by water in the prohibition of section 3 (4) has given them a preferred position.

Section 3 (4) was amended to include common carriers by water within the prohibition against discrimination between connecting lines. However, this change must be read in conjunction with Section 3 (1) which was likewise amended by the Transportation Act of 1940. The principal change was that the prohibition against undue or unreasonable preference or undue or unreasonable prejudice was made subject to a *proviso* reading:

> *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

This specific expression of legislative policy of preserving competition between different kinds of transportation agencies was further emphasized in the change in the rule of rate making embodied in Section 15 (a) (2) where the Commission in exercising its power to prescribe reasonable rates was enjoined to "give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed." As to the phrase quoted, the Commission in *Seatrain Lines, Inc.* v. *A. C. & Y. Ry. Co.*, 243 I. C. C. 199, 214, said:

> The words which have been italicized for emphasis are of particular interest. They were not in either of the bills originally passed by the Senate and House of Representatives but were added by the committee of conference. Their meaning, supported also by the legislative history, seems to be that no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor.

A corresponding provision was enacted into Part III which by Section 305 (c) prohibits undue or unreasonable preference or advantage excepting, however, "discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description," and that "differences in the classifications, rates, fares, charges, rules, regu-

lations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation, shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provisions of this act."

The Commission in sustaining the lawfulness of the proposed rates properly looked beyond the competitive position of the appellee barge line and found that the public interest lay in the denial of the use of the existing proportional rates to the ex-barge traffic. In so doing it exercised the broad discretion which has been vested in a body versed in the intricacies of the transportation field. Compare *Scandrett* v. *United States*, 32 F. Sup. 995, affirmed 312 U. S. 661.

VI

The Commission's conclusion that the proposed rates will not discriminate unjustly against the traffic of appellee barge lines in favor of the traffic of the lake lines, being based upon a finding supported by substantial evidence of the existence of differentiating circumstances and conditions, may not be disturbed

The appellee barge lines have contended that under section 3 (4) the denial of proportional rates out-bound upon their traffic unlawfully discriminates against them in favor of the lake lines whose grain is accorded those proportional rates.

Prior to the Transportation Act of 1920, this Court held that discrimination in rates and charges

between connecting railroads forbidden by section 3 (4) of the Act to Regulate Commerce is a question of administrative fact and is of the same quality as discrimination and undue prejudice against persons and localities. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361. Consistently since then the Commission has held that equality of treatment under this subsection must be determined by similarity of circumstances and conditions. *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I. C. C. 389, 391; *Atlantic C. L. R. Co.* v. *Cape Fear Rys., Inc.*, 218 I. C. C. 152, 157; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20; compare *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 F. 567, appeal dismissed, 149 U. S. 777.

The inclusion of common carriers by water within the definition of connecting line cannot change the Commission's function or undermine the finality of its administrative finding.

The Commission met the issue raised under section 3 (4). It found that the two kinds of traffic were essentially different; that the lake traffic was predominantly wheat from the Northwest as opposed to corn from Illinois (R. 18–355, 383); that "the in-bound haul in connection with the traffic is from the head of the lakes or beyond and is much longer than in connection with the ex-barge traffice" (R. 53); that "the rail-lake-rail rates from the Northwest are therefore much higher than the local rates from Chicago or the barge-rail com-

binations and do not contravene fourth-section principles or jeopardize the all-rail rate structure" (R. 53). These were factors properly considered by it in determining that section 3 (4) was not violated by the application of the local rates to the ex-barge traffic.

VII

The Commission fully performed its duties in this proceeding

A. The Commission properly took into consideration the changes made in the Interstate Commerce Act by the Transportation Act of 1940

Prior to the issuance of the original report the grain brought into Chicago by barge was over lines of contract carrier barges, the one exception being the Federal Barge Line as to which the Commission found (R. 18–359):

> Admittedly the Federal Barge Line is a common carrier, but this line has hauled little if any grain to Chicago from origins on the Illinois Waterways here considered. No evidence was presented as to the common-carrier status of other [than the ones specifically alluded to] independent barge lines hauling grain to Chicago over the Illinois Waterways.

None of these barge rates was then on file with the Commission.

Between the close of hearing and the date of the first report the Transportation Act of 1940 became effective. Water carriers were made subject to Commission regulation, the transportation

policy was rewritten, and other changes in the Act were made. Particularly, section 3 (3) was made section 3 (4) and amended to read:

> (4) All carriers [engaged in the transportation of passengers or property] subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, *and connecting lines,* and for the receiving, *and* forwarding, and delivering of passengers or property to and from [their several lines and those connecting therewith,] *connecting lines*; *and* shall not discriminate in their rates, fares, and charges between [such] connecting lines, or unduly prejudice any [such] connecting line in the distribution of traffic that is not specifically routed by the shipper. *As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III.*[19]

Both the petition of Inland Waterways Corporation for rehearing and reconsideration (R. 28) and the special appearance of Mechling Barge Line seeking rehearing and reconsideration (R. 101) were predicated upon the amendment to section 3 (4). But neither of these petitions sought further hearing save to adduce the additional fact that they had become common carriers by water

[19] Brackets indicate deletions; italics indicate additions.

under part III and had conformed to the requirements of those provisions of the Act. Their pleas were the asserted legal consequences arising out of the amendment to the Act based upon the record as then constituted. Nor did the barge lines in their petitions ask for a reopening of the proceeding to permit them to make a record upon which the Commission could exercise its power under section 6 (11) (b), namely to prescribe proportional rates applicable to the traffic in question, notwithstanding that the Commission had stated that "the record does not contain sufficient information to warrant prescribing proportional rates on traffic arriving at the rate-break points in common carrier boats" (R. 18–359). Consequently the Commission dealt with the new issues that the Transportation Act of 1940 had injected into the case upon a record which all parties deemed adequate for that purpose.

Dealing with the petitions for reconsideration the Commission stated (R. 49):

> The only protestant seeking a further hearing is the Federal Barge Lines, which points out that since the hearing it and certain other barge lines have filed their port-to-port grain rates with us, but this is a fact of which we can take official notice. Certain of the parties ask for reargument. Under the circumstances, we think that no useful purpose would be served by further hearing or reargument and that the matter can

> properly be disposed of in this report with a view to determining what, if any, modification or clarification of the division's findings should be made on reconsideration of the record in the light of the petitions and replies and our prior decisions.

We submit that the finding of the Court below (R. 1675) that the Commission took no evidence addressed to the issue whether the rate proposal was in violation of section 3 (4) or contrary to the national transportation policy, and passed upon that issue upon evidence taken without reference to such issue, is without significance as a basis for setting aside the Commission's order.

B. The Commission was not required to exercise its powers under section 6 (11) (b) in this proceeding

The origin of this proceeding was the filing with the Commission of certain tariffs, the effect of which was to withdraw the use of existing proportional rates on grain which had arrived at the proportional-rate points by barge line and make such grain subject to the use of certain existing local rates. Following representations to it by the Federal Barge Lines and certain grain elevator companies, the Commission exercised the power conferred upon it by section 15 (7)[20] of the Interstate Commerce Act and suspended the tariffs and entered upon an investigation of the lawfulness of the proposed rate application. Un-

[20] See Appendix, *infra*, p. 65.

der the provisions of this section the burden of proof rested upon the railroad carriers to show that "the proposed changed rate * * * is just and reasonable." The issue was then clear-cut. It was the lawfulness of the proposed rates, not of some other or lower rates which might be applied to this particular traffic.

In proceedings under section 15 (7) the Commission had held that it is given the duty to determine the "lawfulness" of the rate but the duty of specifying in what respect and to what extent the new rate will be lawful or unlawful is not laid upon it although it "may" make an order which would be proper in a proceeding pending upon complaint. *Salt from Louisiana Mines to Chicago*, 69 I. C. C. 312; *Livestock to Eastern Destinations*, 156 I. C. C. 498. As indicated in these decisions the Commission is required to determine the lawfulness of the proposed rates and it may but is not required to consider and fix some other or different rates in lieu of the ones proposed. *Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. (2d) 199.

In the instant case the Commission did not arbitrarily refuse to exercise its jurisdiction under section 6 (11) (b) as urged by appellees. This subsection, as before stated, empowers the Commission to establish proportional rail rates on traffic which has been brought to the port or is carried from the port by a common carrier by water. On

the contrary the Commission in the first report stated (R. 18–359):

> Under section 6 (13) (c) (now section 6 (11) (b)) of the act, we have jurisdiction to prescribe proportional rail rates on traffic which has been hauled to a port or is carried from a port by a common carrier by water. This record is replete with complexities and technicalities, and does not contain sufficient information to warrant prescribing proportional rates on traffic arriving at the rate-break points in common carrier boats.

The Commission's report on reconsideration answered the same contentions by holding that it might in a proper proceeding prescribe proportional rates on the ex-barge traffic lower than the combination (R. 54).

Certainly the refusal of the Commission in this proceeding to undertake to fix proportional rates out of the rate-break points applicable to ex-barge grain cannot be said to be so arbitrary as to justify setting aside the order. On the other hand to have undertaken this task upon a record which the Commission itself deemed insufficient would have amounted to arbitrary action.

As has been said the burden was upon the rail carriers to show that the application of the local rates to the ex-barge traffic would not violate any of the provisions of the Act. The Commission found that they had satisfied that burden. It was not incumbent upon them to go further.

This the Commission pointed out in *Freight Rates from Minnesota Points*, 32 I. C. C. 361, 367:

> The respondents have dealt only with the issue presented, and to the extent the evidence is sufficient to justify their claim the presumption should be indulged that any unjust discriminations that may result from the proposed rates in connection with matters not regularly before us will be removed by them. If the carriers should not deal fairly with shippers in this respect, the matter may be brought to our attention by formal complaint, with all interested carriers made parties, to the end that full and complete justice may be done.

CONCLUSION

In conclusion, it may be observed that the substance of this case amounts to an effort on appellees' part to have the court prescribe as rules of law matters relating to transportation problems and policy which have heretofore been recognized as within the peculiar and exclusive province of the Commission. This finds proof in the startling and unusual conclusion of the court below "that the order of the Interstate Commerce Commission discriminates against water competition by users of barge lines." Whatever may be the precise meaning of this cryptic conclusion, it is at least clear that in finding the existence of discrimination, whether in the order of the Commission or in the local rates as applied to the traffic

in question, the court below has trespassed beyond its province. So far as its findings of fact are concerned, which it is to be assumed bear some relation to the conclusion which it reached, it is equally clear that the court below has weighed the evidence and arrived at conclusions of fact contrary to those reached by the Commission upon the same evidence. Here again it overstepped its function.

We submit that the order of the Commission in this case was supported by adequate findings of fact upon substantial evidence; that its determination of the lawfulness of the tariffs under sections 1, 2, and 3 of the Interstate Commerce Act were matters within its administrative field and having made no other errors of law, the order must be sustained and the judgment of the court below reversed and case remanded with direction to dismiss the complaints.

DANIEL H. KUNKEL,
Attorney,
For the Interstate Commerce Commission,
Appellant.

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

DECEMBER 1942.

APPENDIX

Interstate Commerce Act, 49 U. S. C.:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the

transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this

paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 6 (11) (a). To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation

of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this part.

(b) To establish proportional rates, or maximum, or minimum or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the deci-

sion thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interstate carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this

amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

PART III, SEC. 305 (c). It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any

other carrier of whatever description. Differences in the classifications, rate, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I.

SEC. 307 (d). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges

as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

U. S. GOVERNMENT PRINTING OFFICE: 1943